Supreme Court, U. S.
FILED
DEC 14 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-275

OSCAR MAYER & CO., ET AL.,

Petitioners,

vs.

JOSEPH W. EVANS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 18, 1978
CERTIORARI GRANTED JULY 3, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-275

OSCAR MAYER & CO., ET AL.,

Petitioners,

vs.

JOSEPH W. EVANS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INDEX TO APPENDIX.

PAGE

Chronological List of Relevant Docket Entries..... 1

Complaint 3

Defendants' Motion to Dismiss for Lack of Jurisdiction... 7

Relevant Statutory Provisions..... 8

The following opinions and orders are printed in the Appendix to the Petition for a Writ of Certiorari:

Order of District Court, July 8, 1977.....Cert. Pet. App. A1

Opinion, Court of Appeals, April 5, 1978...Cert. Pet. App. A8

Opinion on Rehearing, Court of Appeals, July 6, 1978.... .....Cert. Pet. App. A15

Order Denying Petition for Rehearing en banc, Court of Appeals, July 7, 1978.....Cert. Pet. App. A22

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES.

In the United States District Court for the Southern District of Iowa, Davenport Division

Date	Nr.	Proceedings
5– 7–77	(1)	Complaint.
		Issued summons and delivered to U. S. Marshal.
4– 4–77	(2)	Appearance on behalf of Dfdnts.
3–31–77	(3)	Summons w/Marshal's Return:
		Oscar Mayer & Co. served through L. D. Sheldahl, VP, at Madison, Wisconsin on 3-14-77. Fee: $5.44
		N. D. Ottens served on 3-14-77. Fee $4.00 Robert Bolz served on 3-28-77. Fee: $4.52
		Donald Paul served on 3-16-77 at Davenport, Ia. Fee: $4.44./s/ Schindler, DUSM.
4–13–77	(4)	Motion of Dfdnts to Dismiss for Lack of Jurisdiction.
4–13–77	(5)	Memorandum in Support of Motion of Dfdnts to Dismiss for Lack of Jurisdiction.
4–25–77	(6)	Pltf's Resistance to Motion of Dfdnts to Dismiss for Lack of Jurisdiction.
5– 3–77	(7)	Dfdnts' Rply to Pltf's Memorandum in Resistance to Dfdnts' Motion to Dismiss.
7– 8–77	(8)	Order that dfdnt's motion to dismiss w/regard to pltf's cause for action premised on 42 USC §§ 2000e et seq, shall be, and the same is hereby granted Further Ordered that

defendant's motion to dismiss the cause of action pursuant to Age Discrimination in Employment Act 29 USC S. 621 et seq, shall be, and the same is hereby denied /s/ Stuart, J. (copies to attys & J)

7–25–77 (9) Dfdnt's Motion for Certification of Order of July 8, 1977.

8– 8–77(10) Order that defendants motion for certification for immediate appeal to the Court of Appeals for the Eighth Circuit shall be, and the same is hereby granted /s/ Stuart, J. (copy to attys)

UNITED STATES DISTRICT COURT.

* * (Caption—77-19-D) * *

COMPLAINT.

1. The jurisdiction of the Court is invoked pursuant to 28 U. S. C. 1331 and 1343. This action arises under the provisions of 29 U. S. C. 623, et seq., 43 U. S. C. 2000e, et seq., and Plaintiff invokes the provisions thereof. The amount in controversy exceeds Ten Thousand Dollars ($10,000.00) exclusive of interest and costs.

PARTIES.

2. Plaintiff Joseph W. Evans is an individual residing in Williamsburg, Iowa and until retirement from Oscar Mayer & Co., effective January 31, 1976, was employed by the said Oscar Mayer & Co. as a hog buyer.

3. The Defendant Oscar Mayer & Co. is a corporation incorporated under the laws of the State of Delaware and are licensed to do business in Iowa with their resident agent being CT Corporation System, 1010 Savings & Loan Building, Des Moines, Iowa 50309.

4. The Defendant Robert M. Bolz, is President and chief executive officer of the Defendant Oscar Mayer & Co. whose principal business office is Madison, Wisconsin, and as such, is charged with the responsibility of the administration and executive decisions of the Defendant Oscar Mayer & Co., including personnel decisions.

5. That the Defendant N. D. Ottens is the personnel manager with the Defendant Oscar Mayer & Co., and as such, is the executive administrative officer charged with the responsibility of personnel decisions, including terminations and retirements of employees for the Defendant Oscar Mayer & Co.

6. That the Defendant Donald L. Paul is titled plant manager for the said Oscar Mayer & Co., and is charged with all executive and administrative responsibilities, including personnel decisions for the Davenport plant, in Davenport, Iowa.

7. That the Defendant Paul Gould is the livestock procurement service manager for the Defendant Oscar Mayer & Co. at the Davenport plant in Davenport, Iowa, and as such, was the immediate supervisor and superior of the Plaintiff Joseph W. Evans.

8. That the individual defendants above named were the executive officers and administrative officers charged with personnel decisions regarding the Plaintiff in that the Plaintiff was stationed at the "Davenport plant" and was subject to the direction of Defendants Gould, Paul, Ottens, and Bolz.

9. That for a period of approximately twenty-three (23) years up to and including January 31, 1976, Plaintiff was employed by Oscar Mayer & Co., subject to the direction of the above named individual Defendants, as a hog buyer, and was, on or about January 31, 1976, stationed at the Davenport plant, on "relief buyer status" and operating out of Williamsburg, Iowa.

10. That on or about January 31, 1976, even though Plaintiff had not reached the retirement age of sixty-five years, Plaintiff was forced to accept early retirement under threat of termination, by superiors and administrative officers of the Defendant Oscar Mayer & Co.

11. That Plaintiff's forced retirement was for a reason wholly and totally unrelated to his job performance, that is, namely, his age, in that Plaintiff had performed satisfactorily and adequately for a period of twenty-three years for the Defendant Oscar Mayer & Co.

12. That the illegal actions of the Defendants in forcing Plaintiff's involuntary retirement under threat of termination solely for the reason of his age, is the proximate cause of the damages sustained to the Plaintiff herein.

13. That as a result of the illegal actions of the Defendants and each of them, Plaintiff has suffered and will continue to suffer loss of employment benefits, including pay, vacation and sick leave benefits, and all other acoutrements of employment with the Defendant Oscar Mayer & Co., and further, has suffered damages in the amount of pension allowable to him had he retired at the age of sixty-five, the mandatory retirement date with the Defendant Oscar Mayer & Co. That by letter on or about March 10, 1976, pursuant to statutory requirements, Plaintiff served Notice of Intent to Sue on the Secretary of the Department of Labor, United States Government, Washington, D. C. That voluntary compliance and conciliation has not occurred, and more than sixty (60) days has elapsed since the submission of the Notice to the Secretary.

14. That Plaintiff was, on or about January 31, 1976, more than forty (40) and less than sixty-five (65) years of age, and the Defendant Oscar Mayer & Co. was a private employer of twenty (20) or more persons.

Wherefore, Plaintiff prays that this Court shall:

1. Assume jurisdiction of this cause and set the same down for hearing.

2. Issue an Order compelling the Defendants, and each of them, to immediately reinstate the Plaintiff to his former position, with all rights and privileges pertinent and accruing thereto, effective from and after January 31, 1976.

3. Award Plaintiff actual damages payable by the Defendants jointly and severally, for loss of pay and salary increments denied him because of age discriminatory conduct.

4. Award Plaintiff attorney's fees in this action.

5. Award Plaintiff his costs in this action, and such other further and equitable relief as to the Court shall seem just and proper.

/s/ JOSEPH Z. MARKS
Joseph Z. Marks

/s/ JOSEPH L. MARKS
Joseph L. Marks
605 Savings & Loan Building
Des Moines, Iowa 50309
Telephone: 243-1188

/s/ GORDON ALLEN
Gordon Allen
102 East Grand Avenue
Des Moines, Iowa
Telephone: 243-6101

UNITED STATES DISTRICT COURT

* * (Caption—77-19-D) * *

MOTION OF DEFENDANTS TO DISMISS FOR LACK OF JURISDICTION.

Now come defendants Oscar Mayer & Co., Robert M. Bolz, N. D. Ottens, Donald L. Paul and Paul F. Gould and move this Court, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, to dismiss the above-entitled action for lack of jurisdiction over the subject matter. In support of this Motion, defendants submit the attached Memorandum.

Oscar Mayer & Co.
By /s/ HENRY NEUMAN
Henry Neuman

/s/ ARTHUR J. KOWITT (sg)
Arthur J. Kowitt

/s/ JAMES W. GLADDEN, JR. (sg)
James W. Gladden, Jr.

Of Counsel:

BETTY, NEUMAN, MCMAHON,
HELLSTROM & BITTNER
600 Union Arcade Building
Davenport, Iowa 52801
(312) 326-4491

MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
(312) 782-0600

RELEVANT STATUTORY PROVISIONS.

Section 14(b) of the Age Discrimination in Employment Act, 29 U. S. C. § 633(b), reads as follows:

> (b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: Provided, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority, other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

Section 7(d) of the Age Discrimination in Employment Act, 29 U. S. C. § 626(d), reads as follows:

> (d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—
>
> (1) within one hundred and eighty days after the alleged unlawful practice occurred, or
>
> (2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

> Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

Section 706(c) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-5(c), reads as follows:

> (c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purpose of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

Sections 601A.5, 6, and 14 of the Code of Iowa read as follows:

> **Sec. 601A5. Powers and Duties.** The commission shall have the following powers and duties:
>
> (1) To prescribe the duties of a director and appoint and prescribe the duties of such investigators and other employees and agents as the commission shall deem necessary for the enforcement of this chapter.
>
> (2) To receive, investigate, and pass upon complaints alleging unfair or discriminatory practices.

(3) To investigate and study the existence, character, causes, and extent of discrimination in public accommodations, employment, apprenticeship programs, on-the-job training programs, vocational schools, and housing in this state and to attempt the elimination of such discrimination by education and conciliation.

(4) To seek a temporary injunction against a respondent when it appears that a complainant may suffer irreparable injury as a result of an alleged violation of chapter 601A. A temporary injunction may only be issued ex parte, if the complaint filed with the commission alleges discrimination in housing. In all other cases a temporary injunction may be issued only after the respondent has been notified and afforded the opportunity to be heard.

(5) To hold hearings upon any complaint made against a person, an employer, an employment agency, or a labor organization, or the employees or members thereof, to subpoena witnesses and compel their attendance at such hearings, to administer oaths and take the testimony of any person under oath, and to compel such person, employer, employment agency, or labor organization, or employees or members thereof to produce for examination any books and papers relating to any matter involved in such complaint. The commission shall issue subpoenas for witnesses in the same manner and for the same purposes on behalf of the respondent upon his request. Such hearings may be held by the commission, by any commissioner, or by any hearing examiner appointed by the commission. If a witness either fails or refuses to obey a subpoena issued by the commission, the commission may petition the district court having jurisdiction for issuance of a subpoena and the court shall in a proper case issue the subpoena. Refusal to obey such subpoena shall be subject to punishment for contempt.

(6) To issue such publications and reports of investigations and research as in the judgment of the commission shall tend to promote good will among the various racial, religious, and ethnic groups of the state and which shall tend to minimize or eliminate discrimination in public accommodations, employment, apprenticeship and on-the-job training programs, vocational schools, or housing be-

cause of race, creed, color, sex, national origin, religion, ancestry, or disability.

(7) To prepare and transmit to the governor and to the general assembly from time to time, but not less often than once each year, reports describing its proceedings, investigations, hearings conducted and the outcome thereof, decisions rendered, and the other work performed by the commission.

(8) To make recommendations to the general assembly for such further legislation concerning discrimination because of race, creed, color, sex, national origin, religion, ancestry, or disability as it may deem necessary and desirable.

(9) To cooperate, within the limits of any appropriations made for its operation, with other agencies or organizations, both public and private whose purposes are consistent with those of this Chapter, and in the planning and conducting of programs designed to eliminate racial, religious, cultural, and intergroup tensions.

(10) To adopt, publish, amend, and rescind regulations consistent with and necessary for the enforcement of this Chapter.

(11) To receive, administer, dispense and account for any funds that may be voluntarily contributed to the commission and any grants that may be awarded the commission for furthering the purposes of this chapter with the approval of the executive council.

(12) To defer a complaint to a local civil rights commission under commission rules promulgated pursuant to chapter 17A.

Sec. 601A6. Unfair Employment Practices. (1) It shall be an unfair or discriminatory practice for any:

a. Person to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the age, race, creed, color, sex, national origin, religion or disability of such applicant or employee, unless based upon the nature of the occupation. If a disabled person is qualified to

perform a particular occupation, by reason of training or experience, the nature of that occupation shall not be the basis for exception to the unfair or discriminating practices prohibited by this subsection.

b. Labor organization or the employee, agents, or members thereof to refuse to admit to membership any applicant, to expel any member, or to otherwise discriminate against any applicant for membership or any member, in the privileges, rights or benefits of such membership because of the age, race, creed, color, sex, national origin, or religion, or disability of such applicant or member.

c. Employer, employment agency, labor organization, or the employees, agents, or members thereof to directly or indirectly advertise or in any other manner indicate or publicize that individuals of any particular age, race, creed, color, sex, national origin, religion, or disability are unwelcome, objectionable, not acceptable, or not solicited for employment or membership, unless based upon the nature of the occupation.

If a disabled person is qualified to perform a particular occupation, by reason of training or experience, the nature of that occupation shall not be the basis for exception to the unfair or discriminating practices prohibited by this subsection.

An employer, employment agency, or there employees, servants or agents may offer employment or advertise for employment to only the disabled because of their handicap. Any such employment or offer of employment shall not discriminate among the disabled on the basis of race, color, creed, sex, or national origin.

(2) *Exceptions.* This section shall not apply to:

a. Any employer who regularly employs less than four individuals. For purposes of this subsection, individuals who are members of the employer's family shall not be counted as employees.

b. The employment of individuals for work within the home of the employer if the employer or members of his family reside therein during such employment.

c. The employment of individuals to render personal service to the person of the employer or members of his family.

d. Any bona fide religious institution or its educational facility, association, corporation or society with respect to any qualifications for employment based on religion when such qualifications are related to a bona fide religious purpose.

Sec. 601A.14. Complaints; Hearing. (1) Any person claiming to be aggrieved by a discriminatory or unfair practice may, by himself or his attorney, make, sign, and file with the commission a verified, written complaint in triplicate which shall state the name and address of the person, employer, employment agency, or labor organization alleged to have committed the discriminatory or unfair practice of which complained, shall set forth the particulars thereof, and shall contain such other information as may be required by the commission. The commission, a commissioner, or the attorney general may in like manner make, sign, and filed such complaint.

In an action the plaintiff may recover, if he shows that there was no reasonable cause to believe the ground upon which the complaint was made, the actual damages sustained and reasonable attorney fees to be fixed by the court.

(2) Any employer, labor organization, or other person who has any employees or members who refuse or threaten to refuse to comply with the provisions of this chapter may file with the commission a verified written complaint in triplicate asking the commission for assistance to obtain their compliance by conciliation or other remedial action.

(3) After the filing of a verified complaint, a true copy thereof shall be promptly served by registered mail to the person against whom the complaint is filed. Then a commission or a duly authorized member of the commission's staff shall make a prompt investigation thereof and if such investigating official shall determine that probable cause exists for crediting the allegations of the complaint, the investigating official shall immediately endeavor to eliminate such discriminatory or unfair practice by conference, conciliation, and persuation.

(4) The members of the commission and its staff shall not disclose the filing of a complaint, the information

gathered during the investigation, or the endeavors to elim inate such discriminatory or unfair practice by conference, conciliation, and persuasion, unless such disclosure is made in connection with the conduct of such investigation.

(5) In case of failure to satisfactorily settle a complaint by conference, conciliation, and persuasion, or in advance thereof if in the opinion of the investigating official circumstances so warrant, the official may issue and cause to be served a written notice together with a copy of such complaint, as the same may have been amended, requiring the person, employer, employment agency, or labor organization named in such complaint, hereafter referred to as respondent, to answer the charges of such complaint in writing within ten (10) days after the date of such notice or within such extended time as the investigating official may allow.

(6) When the investigating official is satisfied that further endeavor to settle a complaint by conference, conciliation, and persuasion shall be futile, the official shall report the same to the commission. If the commission determines that the circumstances warrant, it shall issue and cause to be served a written notice requiring the respondent to answer the charges of such complaint at a hearing before the commission, a commissioner, or such other person designated by the commission to conduct the hearing, hereafter referred to as hearing examiner, and at a time and place to be specified in such notice.

(7) The case in support of such complaint shall be presented at the hearing by one of the commission's attorneys or agents. The investigating official shall not participate in the hearing except as a witness nor shall he participate in the deliberations of the commission in such case.

(8) The respondent may file a written verified answer to the complaint, and may appear at the hearing in person, with or without counsel, and submit testimony. In the discretion of the hearing examiner, a complainant may be allowed to intervene and present testimony in person or by counsel.

(9) When a respondent has failed to answer a complaint at a hearing as provided by this section the commis-

sion may enter his default. For good cause shown, the commission may set aside an entry of default within 10 days after the date of such entry. If the respondent is in default, the commission may proceed to hear testimony adduced upon behalf of the complainant. After hearing such testimony, the commission may enter such order as in its opinion the evidence warrants.

(10) The commission or the complainant shall have the power to reasonably and fairly amend any complaint and the respondent shall have like power to amend his answer.

(11) The commission shall not be bound by the strict rules of evidence prevailing in courts of law or equity but the right of cross-examination shall be preserved. Complainant shall bear the burden of proving the allegations in his complaint. The testimony taken at a hearing shall be under oath, reported, and, if ordered by the commission transcribed.

(12) If, upon taking into consideration all the evidence at a hearing, the commission shall find that a respondent has engaged in or is engaging in, any discriminatory or unfair practice as defined in this chapter, the commission shall state its findings of fact and shall issue and cause to be served upon such respondent an order requiring such respondent to cease and desist from such discriminatory or unfair practice and to take such affirmative action, including, but not limited to, hiring, reinstatement, or upgrading of employees, with or without back pay, the referring of applicants for employment by any respondent employment agency, the admittance or restoration to membership by any respondent labor organization, the admission to or continuation in enrollment in an apprenticeship program, on-the-job training program, the posting of notices, and the making of reports as to the manner of compliance, as in the judgment of the commission shall effectuate the purposes of this chapter.

(13) If, upon taking into consideration all the evidence at a hearing, the commission shall find that a respondent has not engaged in any such discriminatory or unfair practice, the commission shall state its findings of fact and shall

issue and cause to be served an order on the complainant and the respondent dismissing the complaint.

(14) The commission shall establish rules to govern, expedite, and effectuate the procedures established by this chapter and its own actions thereunder.

(15) Any complaint filed under this chapter shall be so filed within 120 days after the alleged discriminatory or unfair practice occurred.